

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

Robyn West,

Complainant,

PROBABLE CAUSE ORDER

v.

Dan Sanders and Citizens for
Responsible Government,

Respondents.

The above-entitled matter came on for a probable cause hearing before Administrative Law Judge (ALJ) Jeanne M. Cochran on October 29, 2012. This matter was convened to consider a campaign complaint filed under the Fair Campaign Practices Act by Robyn West on October 22, 2012. The probable cause hearing was conducted by telephone conference call. The probable cause record closed on October 30, 2012, after supplemental filings by the parties.

R. Reid LeBeau, Attorney at Law, appeared on behalf of Robyn West (Complainant). Brian F. Rice, Attorney at Law, appeared on behalf of Respondent Dan Sanders. John M. Huberty, Attorney at Law, appeared on behalf of Citizens for Responsible Government, Inc.

Based upon the record and all the proceedings in this matter, and for the reasons set forth in the attached Memorandum incorporated herein, the Administrative Law Judge makes the following:

ORDER

IT IS HEREBY ORDERED THAT:

1. There is probable cause to believe that Respondent Dan Sanders violated Minnesota Statutes § 211B.04 (governing disclaimers on campaign material) in connection campaign billboards that Mr. Sanders prepared and caused to be disseminated in support of his campaign for Anoka County Commissioner.

2. There is probable cause to believe that Respondent Citizens for Responsible Government, Inc. ("Citizens") violated Minn. Stat. § 211B.04 in connection with signs that Citizens prepared and disseminated in Blaine, Minnesota in support of Dan Sanders' candidacy for Anoka County Commissioner.

3. This matter is referred to the Chief Administrative Law Judge for assignment to a panel of three Administrative Law Judges, pursuant to Minn. Stat. § 211B.35.

4. Should the Parties decide that this matter may be submitted to the assigned Panel of Judges based on this Order and the record created at the Probable Cause hearing, without an evidentiary hearing, they should notify the undersigned Administrative Law Judge by **4:30 p.m. on Monday, November 5, 2012**. If both Parties do not agree to waive their right to an evidentiary hearing, this matter will be scheduled for an evidentiary hearing in the near future.

Dated: November 2, 2012

s/Jeanne M. Cochran
JEANNE M. COCHRAN
Administrative Law Judge

MEMORANDUM

Factual Background

Respondent Dan Sanders is a candidate for Anoka County Commissioner District 3. Respondent Citizens for Responsible Government, Inc., is, according to the Complaint, a Minnesota registered corporation engaging in independent expenditure activity in the election for Anoka County Commission.

On October 22, 2012, Robyn West filed a Complaint alleging that on or about October 10, 2012, Mr. Sanders, by and through his campaign committee, prepared and caused to be disseminated billboard advertisements promoting his candidacy that lack the disclaimer required by Minn. Stat. § 211B.04.¹ In support of her allegation, the Complainant attached black and white copies of two photographs of Sanders' campaign billboards.² A disclaimer is not visible on the billboards in the copies of the photographs.³

In response to the Complaint, Mr. Sanders filed an affidavit stating that the billboards in question do contain a disclaimer that states: "Prepared and paid for by Citizens for Sanders, 8685 Hastings St. NE, Blaine, MN 55449."⁴ Mr. Sanders' affidavit includes, as Exhibit 2, a color photograph of a portion of one of his billboards. The photograph has a red-ink circle around some print on the bottom right-hand corner of

¹ Complaint.

² Complaint Ex. A-1 and A-2.

³ *Id.*

⁴ Affidavit of Dan Sanders at para. 1, Ex. 1.

the billboard.⁵ In his affidavit, Mr. Sanders states that it is the disclaimer that is encircled in red-ink on the photograph of the billboard. He also concedes that it is hard to see the disclaimer in the photograph.⁶ At the probable cause hearing, Mr. Sanders reiterated that there is a disclaimer on the billboards.⁷ He stated that the disclaimer is visible to a person standing approximately 30 yards away but he conceded that it may not be visible to a person driving by in a car at 60 miles per hour.⁸

In addition to alleging that Mr. Sanders' campaign billboards violate Minn. Stat. § 211B.04, the Complainant also alleges that Respondent Citizens prepared and disseminated campaign lawn signs throughout Blaine that promote Mr. Sanders' candidacy for Anoka County Commissioner that lack the disclaimer required by Minn. Stat. § 211B.04.⁹ The Complainant attached to the Complaint black and white copies of photographs of the campaign signs.¹⁰ The campaign signs depicted in the copies of the photographs do not appear to have a disclaimer, but the pictures were taken at a considerable distance.¹¹

Prior to the probable cause hearing, Citizens filed an affidavit from its director, Mr. William A. Erhart.¹² In his affidavit, Mr. Erhart states that the Citizens' signs do contain the following disclaimer: "Prepared and paid for by Citizens for Responsible Government, Inc. 1207 Constance Boulevard, Ham Lake, Minnesota."¹³ The affidavit also states that the signs are all the same design and all state only: "Dan Sanders for County Commissioner."¹⁴ The affidavit includes color photographs of a sign containing the disclaimer.¹⁵ The disclaimer runs along the very bottom of the sign in small print. In addition to providing an affidavit, Mr. Erhardt stated at the probable cause hearing that all the signs were printed with the disclaimer.¹⁶ He further testified that he and two other individuals put wood frames around the signs, and then posted the signs in various locations around Blaine.¹⁷ According to Mr. Erhardt, he and the others were careful to place the wood frame in a manner that did not obscure the disclaimer.

The Administrative Law Judge allowed the Complainant to submit three additional color photographs of a Citizens' sign located at 119th and Radisson that does not appear to have a disclaimer.¹⁸ In response, Citizens filed a second affidavit of Mr. Erhart.¹⁹ In that affidavit, Mr. Erhart states that he observed Citizens' campaign signs at

⁵ Sanders Aff., Ex. 2.

⁶ *Id.* at para. 4.

⁷ Testimony of Dan Sanders.

⁸ *Id.*

⁹ Complaint, Ex. B, C-1 and C-2 (photos of signs).

¹⁰ *Id.*

¹¹ *Id.*

¹² Affidavit of William A. Erhart dated October 25, 2012.

¹³ Erhart Aff. at para. 2.

¹⁴ *Id.* at para. 3.

¹⁵ *Id.*, Ex. A and Ex. B.

¹⁶ Testimony of William Erhart.

¹⁷ *Id.*

¹⁸ Photographs filed on October 29, 2012 by Complainant.

¹⁹ Affidavit of William A. Erhart dated October 29, 2012.

eleven different locations and the only location where a sign did not have a visible disclaimer is the location identified by Complainant in the October 29, 2012 supplemental filing. Mr. Erhart also states that he hand wrote the disclaimer on the sign at that location.²⁰

Legal Standard

The purpose of a probable cause determination is to determine whether, given the facts disclosed by the record, it is fair and reasonable to hear the matter on the merits.²¹ If the judge is satisfied that the facts appearing in the record, including reliable hearsay, would preclude the granting of a motion for a directed verdict, a motion to dismiss for lack of probable cause should be denied.²² A judge's function at a probable cause hearing does not extend to an assessment of the relative credibility of conflicting testimony. As applied to these proceedings, a probable cause hearing is not a preview or a mini-version of a hearing on the merits; its function is simply to determine whether the facts available establish a reasonable belief that the Respondent has committed a violation. At a hearing on the merits, a panel has the benefit of a more fully developed record and the ability to make credibility determinations in evaluating whether a violation has been proved, considering the record as a whole and the applicable evidentiary burdens and standards.

Analysis of Alleged Violation by Respondent Dan Sanders

Minnesota Statutes § 211B.04 requires "campaign material" to "prominently" include the name and address of the person or committee causing the material to be prepared or disseminated.²³ The disclaimer is required to provide the name and address of the candidate's committee that prepared and paid for the signs and must read substantially as follows: "Prepared and paid for by the _____ committee _____ (address)."²⁴ Campaign material is defined in relevant part as any material disseminated for the purpose of influencing voting.²⁵

The Complainant argues that probable cause exists to proceed to an evidentiary hearing on the allegations against Mr. Sanders because there are factual issues in

²⁰ See *id.*

²¹ *State v. Florence*, 239 N.W.2d 892, 902 (Minn. 1976).

²² *Id.* at 903. In civil cases, a motion for a directed verdict presents a question of law regarding the sufficiency of the evidence to raise a fact question. The judge must view all the evidence presented in the light most favorable to the adverse party and resolve all issues of credibility in the adverse party's favor. See, e.g., Minn. R. Civ. P. 50.01; *LeBeau v. Buchanan*, 236 N.W.2d 789, 791 (Minn. 1975); *Midland National Bank v. Perranoski*, 299 N.W.2d 404, 409 (Minn. 1980). The standard for a directed verdict in civil cases is not significantly different from the standard for summary judgment. *Howie v. Thomas*, 514 N.W.2d 822 (Minn. App. 1994).

²³ Minn. Stat. § 211B.01, Subd. 2 defines "campaign material" to mean "any literature, publication, or material that is disseminated for the purpose of influencing voting at a primary or other election, except for news items or editorial comments by the news media."

²⁴ Minn. Stat. § 211B.04 (2012).

²⁵ Minn. Stat. § 211B.01, subd. 2.

dispute as to whether his billboards contain the necessary disclaimer and, if they do, whether the disclaimer is “prominent” as required by the statute. The Complainant argues that if the disclaimer is on the billboards, the print is so small as to be nearly invisible.

Respondent Dan Sanders argues that the billboards do have a disclaimer substantially in the form required by the statute, and that therefore the Complaint should be dismissed as to him. In addition, he argues that the Complaint should be dismissed because the billboards are “objects” and fall within the exception set forth in Minn. Stat. § 211B.04(e). Finally, he asserts that the Complaint should be dismissed because Minn. Stat. § 211B.04 is unconstitutional. In support of this argument, Mr. Sanders cites to the 2006 decision of the Minnesota Court of Appeals in *Riley v. Jankowski*.²⁶ In that case, the Court of Appeals determined that § 211B.04 directly regulated the content of pure speech and that there was no way to narrowly construe the statute so as to avoid this constitutional violation. The Court concluded that the disclaimer requirement was unconstitutional on its face and therefore unenforceable.²⁷

As an initial matter, the Administrative Law Judge finds that Sanders’ campaign billboards meet the definition of “campaign material” and, thus, are required to prominently include a disclaimer as set forth at Minn. Stat. § 211B.04.²⁸ The Complaint attached copies of photographs of two Sanders’ billboards that do not appear to have a disclaimer.²⁹ In addition, a disclaimer is not visible on the color photograph of the billboard filed by Mr. Sanders.³⁰ While Mr. Sanders testified at the probable cause hearing that there is in fact a disclaimer in the bottom right-hand portion of the billboard pictured in the photograph he submitted, all that can be seen is illegible small black print.³¹ Thus, a fact question remains as whether the Sanders’ billboards contain the required disclaimer and, if so, whether the disclaimer satisfies the requirement that disclaimers be “prominently included” on campaign material.

The Administrative Law Judge also finds that the exception to the disclaimer requirement found at Minn. Stat. § 211B.04(e) does not provide a basis for dismissing the Complaint as to Respondent Sanders. The exception is limited to “objects stating only the candidate's name and the office sought.” The Sanders’ billboards include more than just Mr. Sanders’ name and the office he seeks. They also include the following language: “When it comes to creating jobs and businesses in Anoka County, here’s the guy we can count on.”³² Thus, the billboards do not fall within the exception to the disclaimer requirement provided at Minn. Stat. §211B.04(e) and the Complaint cannot be dismissed on that ground.

²⁶ *Riley v. Jankowski*, 713 N.W.2d 379 (Minn. App.) review denied (Minn. 2006).

²⁷ *Id.*

²⁸ See Minn. Stat. § 211B.01, Subd. 2, Minn. Stat. § 211B.04.

²⁹ Complaint, Exs. A-1 and A-2.

³⁰ Complaint, Ex. 2.

³¹ *Id.*

³² Sanders Aff., Ex. 1 at 1.

Finally, as a general rule, neither an administrative law judge nor an administrative agency has authority to declare a statute unconstitutional on its face. An administrative law judge or an agency may only properly consider whether a statute is unconstitutional as applied to the particular facts of a case.³³ Thus, Respondent's facial challenge to Minn. Stat. § 211B.04 is not properly before the ALJ and may not be grounds for dismissing the complaint in this proceeding. The Administrative Law Judge notes only that while the disclosure requirements in § 211B.04 were found to be unconstitutional by the Minnesota Court of Appeals in *Riley v. Jankowski*, the U.S. Supreme Court held in *Citizens United v. FEC*,³⁴ that federal disclaimer provisions place no significant burden on First Amendment rights. Following that decision, the Minnesota Legislature amended Minn. Stat. § 211B.04 effective June 1, 2010 to apply to all campaign material prepared and disseminated on or after that date.³⁵

The Administrative Law Judge finds that the Complainant has put forward sufficient facts to support finding probable cause that Respondent Dan Sanders violated Minn. Stat. § 211B.04 with respect to his billboards.

Analysis of Alleged Violation by Respondent Citizens for Responsible Government, Inc.

Complainant argues that probable cause exists to find that Citizens has violated Minn. Stat. § 211B.04 by preparing and disseminating campaign signs that do not include the required disclaimer. Alternatively, Complainant argues that even if the signs contain a disclaimer, the disclaimer is not prominently displayed in violation of Minn. Stat. § 211B.04. The Complainant provided evidence that at least one of the campaign signs prepared and disseminated by Respondent Citizens does not include the required disclaimer³⁶ and Respondent Citizens does not dispute that the disclaimer on this sign was covered up by the wood frame.³⁷

Respondent Citizen maintains that the Complaint should be dismissed because the signs include a disclaimer that complies with the statute. Alternatively, Respondent Citizens argues that the Complaint should be dismissed because the lawn signs meet the exception for "objects" found at Minn. Stat. § 211B.04(e), and, finally, Minn. Stat. § 211B.04 is unconstitutional.

The Administrative Law Judge rejects Respondent Citizens argument that the Complaint should be dismissed as to Respondent Citizens based on the exception for "objects" found at Minn. Stat. § 211B.04(e) or based on Respondent Citizens'

³³ G. Beck, Minnesota Administrative Procedure § 11.5 (2d ed. 1998). See, e.g., *Neeland v. Clearwater Memorial Hospital*, 257 N.W.2d 366, 368 (Minn. 1977); *Petterssen v. Commissioner of Employment Serv.*, 306 Minn. 542, 543, 236 N.W.2d 168, 169 (Minn. 1975); *Starkweather v. Blair*, 245 Minn. 371, 394-95, 71 N.W.2d 869, 884 (1955); *In the Matter of Rochester Ambulance Service*, 500 N.W.2d 495 (Minn. App. 1993).

³⁴ 558 U.S. 50 (21010).

³⁵ See Laws of Minnesota 2010 Chapter 397.

³⁶ Photographs filed on October 29, 2012 by Complainant.

³⁷ Affidavit of William A. Erhart dated October 29, 2012.

contention that Minn. Stat. § 211B.04 is unconstitutional. Prior decisions by this Office have concluded that lawn signs are “campaign material” requiring a disclaimer, and that the exception to the requirement for “objects” is limited to items that have an intrinsic value separate from their promotional message (such as pens or emery boards).³⁸ In addition, as already discussed above, the Administrative Law Judge will not dismiss the Complaint based on Respondent Citizens’ contention that Minn. Stat. § 211B.04 is unconstitutional.

The Administrative Law Judge finds that the Complainant has put forward sufficient facts to support finding probable cause that Respondent Citizens violated Minn. Stat. § 211B.04 with respect to the lawn signs.

Conclusion

The Administrative Law Judge concludes that based on the record presented, the Complainant has demonstrated probable cause to believe that Respondents have violated Minn. Stat. § 211B.04. It is reasonable to require the Respondents to go to hearing on the merits and to allow a panel of three Administrative Law Judges to determine whether the Respondents violated Minn. Stat. § 211B.04, and if so, what penalty is appropriate. Should the Parties decide to waive the evidentiary hearing and submit the matter on the record made at the Probable Cause hearing with further written submissions, they must notify the ALJ by the date and time stated in the Order.

J. M. C.

³⁸ See *Kalil v. Knutson*, OAH Docket 3-6302-16119-CV, (Probable Cause Order) (Aug. 31, 2004); *Hansen v. Stone*, OAH Docket 4-6326-16911-CV (Findings of Fact, Conclusions, and Order) (Oct. 28, 2005).